

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

77-1432

To be argued by
RONALD GENE WOHL

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DOCKET NO. 77-1432

UNITED STATES OF AMERICA,

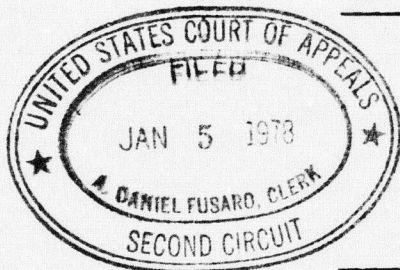
Appellee,

-against-

RICHARD PAGLIALONGA,

Appellant.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF NEW YORK



~~APPENDIX AND~~
BRIEF FOR APPELLANT
RICHARD PAGLIALONGA

SERRA, PERELSON, METCALF and ARCHULETA,
Attorneys for Defendant-Appellant.

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

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Docket No. 77-1432

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RICHARD PAGLIALONGA,

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BRIEF FOR APPELLANT
RICHARD PAGLIALONGA

PRELIMINARY STATEMENT

This is a timely appeal from a Judgment of Conviction of Conspiracy, essentially to import cocaine (Count One of the Indictment). The case was tried to a jury before the Honorable Charles L. Brieant. Appellant was acquitted of a second charge of Possession of Cocaine with Intent to Distribute.

On September 30, 1977, the Honorable Charles L. Brieant sentenced appellant to two and one-half years incarceration. Appellant is free on bail pending this appeal, and proceeds in his appeal in forma pauperis.

STATEMENT OF FACTS

It was conceded by implication during the trial of the within matter, that appellant accompanied one of the unindicted co-conspirators on a trip to South America knowing that she was involved in a cocaine smuggling venture. His role at this early stage was merely to afford her psychological and physical security, and he was to have no direct or indirect participation in the smuggling venture itself.

Unanticipatedly and by mishap, he was required by a series of events to secrete the cocaine in the environs of Lima, Peru. It is conceded that he buried the same.

Thereafter, it was shown by direct and circumstantial evidence that the appellant withdrew from any conspiracy that he had voluntarily or involuntarily joined by his behavior to the point of burrying the cocaine.

Six months subsequent approximately to the burial of the cocaine, appellant returned to show another unindicted co-conspirator the location of the burial. He thereafter, without participating in the smuggling of the cocaine into the United States, returned to the New York area.

It was the theme of the defense throughout that appellant had withdrawn from the conspiracy upon his departure from South America after involuntarily being involved in the burial of the cocaine. That some six months thereafter his return thereto was occasioned by coercion from unnamed parties claiming a proprietary interest in the contraband.

It is on the issue of appellant's withdrawal that this appeal is centered. Appellant requested an instruction relating to Withdrawal as a Defense, which recited in any fashion the legal principle that withdrawal may occur subsequent to the commission of an overt act by any of the co-conspirators, including appellant. It was the Honorable Court's position in his charge to the jury, that withdrawal could not, as a matter of law, occur subsequent to the commission of an overt act by any of the co-conspirators, including appellant.

Below specified is the charge in salient portion which appellant excepted to and upon which now he predicates his appeal:

"With respect (to) a conspirator, if he or she knowingly and wilfully joined the conspiracy charge here, having knowledge of its unlawful objectives, and tending to make it something which he or she wished to succeed and having a stake in its outcome, and an overt act is thereafter committed in furtherance of the conspiracy as charged in the indictment while he or she remained

a member of it, and if all that appears clear to the jury beyond a reasonable doubt, then his or her guilt on Count 1 would be complete.

"However, if a conspirator withdraws from a conspiracy before the commission of an overt act, none having taken place during his or her membership, then an overt act committed after his or her withdrawal from the conspiracy may not be considered in proving Count 1 as against that particular conspirator whose case you are then considering.

* * *

"In considering directly the case of Mr. Paglialonga, if he joined the conspiracy knowingly and wilfully and an overt act was committed in furtherance thereof and if he thereafter withdrew, he still may be convicted of the crime of conspiracy in violation of Count 1, based on his membership prior to his withdrawal and the commission of an overt act by one or more of the co-conspirators prior to his withdrawal.

"Specifically I instruct you that you may, but you need not infer from the evidence in this case that Mr. Paglialonga knowingly went to South America on the first trip with Miss Marsha Renee Brown, intending to protect her while she engaged in importation of cocaine on the first trip, and did so with the intention of receiving some of the proceeds from the sale of the cocaine or some cocaine or both, then you may find that he thereby made himself a member of the conspiracy and made

it something that he wished to succeed and had a stake in the outcome.

"And if he knowingly and willfully did so you may find that all of the elements of the crime have been proved against Paglia. If so, then he may be convicted on Count 1 even if you are satisfied of his later activities in connection with the second trip were the product of coercion and duress and were not intentional or that he withdrew when Edward White was arrested."

(Senographer's Minutes,
Volume #3, pages 875-878)

A R G U M E N T

ONE MAY WITHDRAW FROM A
CONSPIRACY AFTER THE
COMMISSION OF AN OVERT ACT

It is conceded at the offset that in the Second Circuit, the case of United States v. Borelli, 336 F.2d 376, 388 (2d Cir. 1964), cert.den., 379 U.S. 960, 85 S.Ct. 647, 13 L.Ed. 2d 555 (1965), stands for the proposition that withdrawal from a conspiracy must precede the commission of an overt act to constitute a defense thereto. Such, it will be submitted herein, is not validly the law and should not be validly the law on this issue.

Borelli, supra, quotes from the Grandfather case on the issue, Hyde v. United States, 225 U.S. 347, 369, 32 S.Ct. 793, 56 L.Ed. 1114 (1912), in establishing the above proposition. Hyde said the following:

"Having joined in an unlawful scheme, having constituted agents for its performance, scheme and agency to be continuous until full fruition be secured, until he does some act to disavow or defeat the purpose, he is in no position to claim the delay of the law." (Emphasis supplied)

It is submitted that the above language, "until full fruition be secured", tells us that withdrawal is allowable at any time before the object of the conspiracy is fulfilled.

Such interpretation of Hyde, supra, is not merely the unsupported position of appellant herein by way of his wishful thinking, but is in fact an interpretation placed on Hyde by a significant line of cases, to wit:

People v. Wilson, 76 C.A. 688 (1926);

People v. Corkery, 134 C.A. 294, 298 (1933);

Karnes v. State, 252 S.W. 1 (1923);

State v. Allen, 47 Conn. 121;

State v. Kinchen, 126 La. 39,
52 South 185, 16 C.J. 137;

Commonwealth v. Spriggs, 344 A.2d 880
(1975);

Commonwealth v. Griffey, 307 A.2d 283
(1973);

Commonwealth v. Roux, 350 A.2d 867
(1976);

Commonwealth v. Doris, 135 A. 313 (1926).

Oddly enough, Hyde is the hailed progenitor of both views of withdrawal, i.e., the line in which Borelli, supra, falls, (withdrawal must be before an overt act), and the line we urge this Circuit to adopt as exemplified in the cases cited, (withdrawal may follow an overt act).

The cases standing for the rule that withdrawal may follow an overt act usually limit the withdrawal to a time period very close to the attainment of the substantive crime object of the conspiracy, e.g., "It must occur before the commission of the crime becomes so imminent that avoidance is out of the question". (Roux, supra, at 871). See also, People v. Drake, 310 P.2d 997 (Cal. App.), wherein the liability of a conspirator continues until his intent to withdraw therefrom is in some way brought home to the other conspirators before the commission of the substantive offense or before its purpose is fully accomplished or frustrated.

Witkin indicates the rationale for allowing withdrawal after the commission of an overt act:

" . . . the policy to encourage abandonment of the criminal plan before it is carried out is equally applicable. Accordingly some authorities allow the defense even though the withdrawal takes place after the overt act."

Witkin Crimes, §120,
pages 112, 113.

Witkin cites 72 Harvard Law Review 957,
which specifies the policy reasons behind allowing the defense

of withdrawal even after an overt act is fulfilled. They are here summarized as follows:

- 1) weakens the group of which conspirator is a member;
- 2) less likely that object of conspiracy will occur;
 - a) gives other conspirators sufficient time to reconsider;
- 3) renunciation, at any point until act in question has become so imminent that its avoidance is practically out of the question, manifests a lack of the firmness of purpose that evidences individual dangerousness;
- 4) whether prior or subsequent to overt act, the law should provide a means of encouraging persons to desist from pressing forward with their criminal designs;
- 5) no real danger until substantive act has taken place.

The most compelling reason for allowing withdrawal as a defense to conspiracy even after the commission of an overt act, however, is one of logic. That is, in the Second Circuit, conspiracy is not complete, there is no crime of conspiracy until there is an overt act coupled to the agreement.

Therefore, under the rule of Borelli, supra, to allow withdrawal only before an overt act is to allow no defense of withdrawal whatsoever. Because before the overt act is committed, there is no crime to withdraw from.

If we are to honor the real intent of Hyde, supra, we must interpret Hyde as promulgating withdrawal as a defense to conspiracy. It can only be a defense to the crime of conspiracy if the withdrawal is allowed after the crime is complete, i.e., the overt act has occurred.

We urge the Second Circuit to reconsider the wisdom of Borelli, supra, in the foregoing light and re-define its position in regard to the rule of withdrawal as a defense to conspiracy.

CONCLUSION

In view of the foregoing, it is respectfully urged that the conviction of the appellant Paglialonga be reversed and the case remanded for a new trial.

Respectfully submitted,

SERRA, PERELSON, METCALF and ARCHULETA,
Attorneys for Defendant-Appellant

FERZIGER, WOHL & FINKELSTEIN,
Local Counsel.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Appellee,

AFFIDAVIT OF SERVICE

-against-

Docket No. 77-1432

RICHARD PAGLIALONGA,

Appellant.

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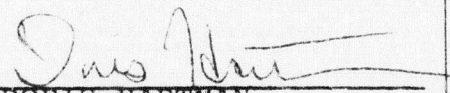
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COUNTY OF NEW YORK)

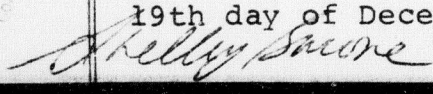
DORIS HARTMAN, being duly sworn, deposes and says:

That deponent is not a party to the action, is
over 18 years of age and resides at Brooklyn, New York.

That on the 19th day of December, 1977, deponent
served the within APPENDIX AND BRIEF FOR APPELLANT RICHARD
PAGLIALONGA upon Assistant United States Attorney, ALLEN
R. BENTLEY, at United States Department of Justice, United
States Attorney, Southern District of New York, United States
Courthouse Annex, One St. Andrew's Plaza, New York, New York
10007, the address designated by said attorney for that purpose
by depositing a true copy of same enclosed in a post paid
property addressed wrapper, in a post office official depository
under the exclusive care and custody of the United States Postal
Service within the State of New York.

Sworn to before me this
19th day of December, 1977


DORIS HARTMAN

SHELLEY BARONE
NOTARY PUBLIC, State of New York
No. 5160895
Commission Expires March 30, 1978


☐ INDIVIDUAL VERIFICATION

STATE OF NEW YORK, COUNTY OF

ss.:

deponent is the
read the foregoing

the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true.

, being duly sworn, deposes and says, that
in the within action; that deponent has
and knows the contents thereof; that☐ CORPORATE VERIFICATIONdeponent is the of
named in the within action; that deponent has

read the foregoing

the corporation

and knows the contents thereof; and that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters deponent believes it to be true. This verification is made by deponent because

is a

corporation. Deponent is an officer thereof, to wit, its

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

Sworn to before me, this

day of

19

☐ ATTORNEY'S AFFIRMATION

STATE OF NEW YORK, COUNTY OF

ss.:

The undersigned, an attorney admitted to practice in the courts of New York State;
shows, that deponent is
the attorney(s) of record for

in the within action; that deponent has read the foregoing

and knows the contents thereof; that same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true. Deponent further says that the reason this verification is made by deponent and not by

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

The undersigned affirms that the foregoing statements are true, under the penalties of perjury.

☐ CERTIFICATION BY ATTORNEYcertifies that the within
found to be a true and complete copy.

has been compared by the undersigned with the original and

Dated:

☐ AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK, COUNTY OF

ss.:

being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at

That on the
upon

day of

19

deponent served the within

in this action, at

attorney(s) for

by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in a post office-official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

☐ AFFIDAVIT OF PERSONAL SERVICEupon
the

herein, by delivering a true copy thereof to

h

personally. Deponent knew the
therein.

Sworn to before me, this

day of

19

NOTICE OF ENTRY

Sir : PLEASE TAKE NOTICE that the within
is a true-certified copy of a

duly entered in the office of the clerk of the within
named court

on . 19

Dated: 19

Yours, etc.,

FERZIGER WOHL & FINKELSTEIN

Attorneys for

Office and Post Office Address
1350 AVENUE OF THE AMERICAS
NEW YORK, N.Y. 10019

To:

Attorney for

NOTICE OF SETTLEMENT

Sir : PLEASE TAKE NOTICE that

of which the within is a true copy will be pre-
sented for settlement to Mr. Justice

one of the Justices of the within named Court
at

on the day of 19

at M.

Dated: 19

Yours, etc.,

FERZIGER WOHL & FINKELSTEIN

Attorneys for

Office and Post Office Address
1350 AVENUE OF THE AMERICAS
NEW YORK, N.Y. 10019

To:

Esq .

Attorney for

Docket No. 77-1432

~~XXXXXX~~

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UNITED STATES COURT OF
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AFFIDAVIT OF SERVICE

FERZIGER WOHL & FINKELSTEIN

Attorneys for Appellant

Office and Post Office Address
1350 AVENUE OF THE AMERICAS
NEW YORK, N.Y. 10019
(212) 765-6460

To:

Esq

Attorney for

Service of a copy of the within

is hereby admitted:

Dated, N. Y.,

19

Attorney for